Supreme Court, U.S.
FILED

(2) 931395 MAR 3 1994

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

THE STATE OF OKLAHOMA,

Petitioner,

v.

JACKIE EUGENE HUMPHREY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

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March, 1994
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"EXHIBIT A"

JACKIE EUGENE HUMPHREY,	)	
	)	
Appellant,	)	
	)	
-vs-	)	F-88-57
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

COURT OF CRIMINAL APPEALS OF OKLAHOMA

September 27, 1993

As Corrected Oct. 4, 1993.

Rehearing denied December 3, 1993

Defendant was convicted in the District Court, Okmulgee County, Ann Moroney, J., of murder in the first degree and was sentenced to death. Defendant appealed. The Court of Criminal Appeals, Lane, J., held that (1) sentencing court erred by instructing jury as to life imprisonment and death but failing to instruct on punishment of life without parole, and (2) defendant was not entitled to instruction on heat of passion manslaughter.

Judgment affirmed, sentence vacated and remanded.

Lumpkin, P.J., filed opinion concurring in part and dissenting in part.

1. **Homicide 311, 340(1)**

In sentencing defendant convicted of first-degree murder, sentencing court erred in instructing jury on life imprisonment and death, but failing to instruct on punishment of life without parol; such omission rendered sentencing stage fundamentally unfair and required remand for resentencing. 21 Okl.St.Ann. § 701.10.

2. **Homicide 309(3)**

Defendant was not entitled to instruction on heat of passion manslaughter; no evidence was introduced to suggest that defendant acted without design to effect death. 21 Okl.St.Ann. § 711.

An Appeal from the District Court of Okmulgee County; Ann Moroney, District Judge.

Jackie Eugene Humphrey, Appellant, was tried by jury for the crime of Murder in the First Degree in Case No. HCRF-87-5001 in the District Court of Okmulgee County before the Honorable Ann Moroney, District Judge. Appellant was sentenced to Death and has perfected this appeal. Judgment is **AFFIRMED** and Sentence is **VACATED AND REMANDED FOR RESENTENCING.**

James A. Conrady, Okmulgee, at trial Terry J. Hull, Cindy Brown, Asst. Appellate Defenders, Norman, on appeal, for appellant.

Thomas Giulioli, Dist. Attorney., Beryl R. Davis, O.R. Barris, III, Asst. Dist. Attys., Okmulgee, at trial, Robert H. Henry, Atty. Gen., Sandra D. Howard, Asst. Atty. Gen., Oklahoma City, on appeal, for appellee.

OPINION

LANE, JUDGE:

Jackie Eugene Humphrey, appellant, was tried by jury for murder in the first degree (21 O.S.1981, § 701.7) in Okmulgee County District Court, Case No. HCRF-87-5001. The State filed a Bill of Particulars seeking the death penalty. After returning a verdict of guilt, the jury assessed a death sentence.

[1] Life imprisonment and death were the only sentencing options given to the jury. This was error. Under 21 O.S.Supp.1987, § 701.10, which came into effect approximately one month prior to the trial, the jury also should have been instructed on the punishment of "life without parole". This omission renders the sentencing stage fundamentally unfair and requires remand of this case to the District Court for resentencing. Hain v. State, 852 P.2d 744 (Okl.Cr.1993); Salazar

v. State, 852 P.2d 729 (Okl.Cr.1993); 21 O.S.Supp.1985, § 701.13.

Remand for resentencing renders moot all challenges to the second stage of trial.[1] We will address on the merits only Proposition II in which appellant asserts the trial court erred by refusing to instruct the jury on the crime of Heat of Passion Manslaughter.

Appellant stabbed his common law wife, Bessie Phipps, to death on New Years Day in the Cuban Bar in Henryetta, Oklahoma. The common law marriage had been marked with violence apparently precipitated by his drinking and her infidelity. Upon his work release from Jess Dunn Correctional Center

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[1]Second stage challenges include propositions III, IV, V, VI, VII, VIII, IX, X, XI and XII. Proposition I challenges the selection of a death-qualified jury under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968). While this is procedurally a first-stage issue, it challenges the validity of the death sentence imposed and is therefore moot.

December 18, 1986, appellant returned home to discover his wife had taken their household goods and moved in with another man. Sometime on New Years Day, 1987 the appellant called a friend. His wife answered, and when he asked her to come home, she laughed and hung up.

Appellant later came looking for her at the friend's home, and threatened a group there with his folding Buck knife. He was told she was down the road at the Cuban Bar. Appellant took the friend's car and drove there looking for her. He burst through a back door; grabbed her by the hair; held his freshly sharpened Buck knife to her throat; and, as they fell backwards, stabbed her at least four (4) times in the abdomen and chest.

Prior to the attack he told a friend he should, "just slash that god damn bitch to pieces". After the attack he called his estranged wife a "damn whore" and said, "if

she wasn't dead now [he'd] kill her next time". While escorted out of the bar by police he added, "tramp, tramp, tramp, you won't tramp no more". He asked the police officers if they would let him loose so he could "finish the job" if she wasn't dead. Ms. Phipps died in the ambulance on the way to the hospital.

[2] Appellant argues that trial court erred by refusing his requested instruction on Heat of Passion Manslaughter. This argument might be persuasive if evidence to show the appellant was in the heat of passion were enough to warrant this instruction. It is not. To warrant this instruction, evidence must be introduced to support the theory the killing was "perpetrated without a design to effect death". 21 O.S.1981, § 711. No evidence was introduced to suggest the appellant acted without a design to effect death. The instruction was therefore properly

refused. See Brown v. State, 777 P.2d 1355 (Okl.Cr.1989); compare Wood v. State, 486 P.2d 750 (Okl.Cr.1971); see also, Walker v. State, 723 P.2d 273 (Okl.Cr. 1986). In summary, we affirm the conviction and reverse and remand the sentence of death to the District Court for resentencing.

LUMPKIN, P.J., concurs in part/dissents in part.

JOHNSON, V.P.J., and **CHAPEL, J.**, concur.

LUMPKIN, Presiding Judge: concurring in part/dissenting in part.

I concur in the affirmance of the murder conviction but disagree with the decision to reverse and remand for resentencing. As stated in my separate opinions to Hain v. State, 852 P.2d 744, 753 (Okl.Cr.1993), and Salazar v. State, 852 P.2d 729, 741 (Okl.Cr.1993), the appropriate criminal penalty is the penalty in effect at the time the defendant commits the crime.

Therefore, as the sentencing option of life without parole did not come into effect until after Appellant had committed the murder, he is not eligible in this case for the punishment of life without parole.

"EXHIBIT B"

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JACKIE EUGENE HUMPHREY,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	F-88-57
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER DENYING PETITION FOR REHEARING

Jackie Eugene Humphrey, petitioner, was convicted of murder in the first degree and sentenced to death in Okmulgee County District Court, Case No. HCRF-87-5001. Judgment was affirmed, and sentence was reversed and remanded for failure to instruct on the sentencing option of life without parole by this Court on September 27, 1993. (Case No. F-88-57). Petitioner is before the Court on a Petition for Rehearing, alleging the Court overlooked facts decisive of the case. Specifically, petitioner argues he presented facts

sufficient at trial to warrant an instruction on Manslaughter in the First Degree, that is heat of passion manslaughter. On direct appeal this Court rejected the argument, finding the trial court properly instructed the jury.

We again reject the argument. Petitioner stabbed his common law wife, Bessie Phipps to death on New Year's Day, 1987 in the Cuban Bar in Henryetta, Oklahoma. Witnesses to the stabbing testified Petitioner called Ms. Phipps a "damned whore" and said if she wasn't dead he'd kill her next time. He also asked police officers called to the scene to turn him loose so he could "finish the job" if she wasn't dead. While the defendant testified in his own behalf he had no intent to kill, he also stated on direct he did not remember the stabbing. On cross-examination he stated he had no memory of what he said during the stabbing, or of the

stabbing itself. Under these circumstances, the trial court did not abuse its discretion in finding insufficient evidence was presented to warrant the first degree manslaughter instruction.

IT IS THEREFORE THE ORDER OF THE COURT that the Petition for Rehearing filed herein be and is hereby denied, and mandate ordered to be issued forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 3rd day of December, 1993.

GARY L. LUMPKIN, PRESIDING JUDGE

CHARLES A. JOHNSON, VICE-PRESIDING JUDGE

JAMES F. LANE, JUDGE

CHARLES CHAPEL, JUDGE

RETA M. STRUBHAR, JUDGE